Supreme Court, U.S.
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In the Supreme Court of the United States

JAVIER ZAMACONA-ESCALERA,
Petitioner,

v.

ATTORNEY GENERAL JOHN ASHCROFT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals streamlining procedure is in offense of an alien immigrant's right to due process under the Fifth Amendment to the Constitution of the United States?

2. Whether the Board of Immigration Appeals streamlining procedure's application to Petitioner, as affirmed by the United States Court of Appeals for the Ninth Circuit in accordance with Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003), violated Petitioner's right to due process under the Fifth Amendment of the Constitution of the United States.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Javier Zamacona-Escalera respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit (App., *infra*, 1) dismissed the preceding petition for review in an unreported order filed on August 17, 2004. The Board of Immigration Appeals in the United States Department of Justice's Executive Office of Immigration Review (App., *infra*, 2), on August 14, 2003, affirmed, without opinion, the decision of the Immigration Judge (App., *infra*, 3) originally entered on January 2, 2002.

JURISDICTION

The court of appeals entered its judgment for docket number 03-73132 on August 17, 2004 (App., *infra*, 1) in an unreported decision and order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals was invoked under 8 U.S.C. § 1252.

STATUTORY PROVISION INVOLVED

Section 101(a)(47) of the Immigration and Nationality Act ("INA"), Section 1101(a)(47) of Title 8 of the United States Code Service established both that persons in removal proceedings have a right to an administrative appeal and also that the Board of Immigration Appeals is the final adjudicator in the administrative appeals process.

STATEMENT

A. Petitioner and His Immigration Status

Petitioner, a 39 year old native and citizen of the country of Mexico, first entered into the United States some time in August 1987 without first being admitted or paroled after inspection by an Immigration Officer. The Immigration and Naturalization Service[1] ("INS") also believed that the Petitioner had entered some time in 1999 without being admitted or paroled after inspection. As a result, on July 28, 2000, the Immigration and Naturalization Service served on the Petitioner a Notice to Appear ("NTA"). The charging document was filed with the immigration court in San Diego, California on August 28, 2000.

At his hearing on January 25, 2001, the Petitioner admitted to the truth of all factual allegations except as to the date of entry in 1999. He asserted an initial date of entry in 1987. He also conceded that he was removable as charged.

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[1] On March 1, 2003, the functions of the former Immigration and Naturalization Service ("INS") were transferred from the Department of Justice to three bureaus (United States Customs and Enforcement, United States Customs and Border Protection, and United States Citizenship and Immigration Services) in the newly formed Department of Homeland Security (DHS). See Homeland Security Act of 2002, Pub.L.No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). Title 8 of the Code of Federal Regulations was reorganized and amended to reflect the resulting division of jurisdictions between DHS and Executive Office for Immigration Review, which includes the immigration court and BIA, and which remains an agency within the Department of Justice under the direction of the Attorney General. See 68 Fed.Reg. 10349 (Mar. 5, 2003)(available at 2003 WL 724287)

B. Proceedings Below

On March 12, 2001, Petitioner filed with the immigration court his Application for Cancellation of Removal and Adjustment of Status for Certain Non-Permanent Residents pursuant to INA § 240A(b), 8 U.S.C. § 1229b. On January 2, 2002, Petitioner proceeded with his application for cancellation of removal for certain non-permanent resident in accordance with Section 240A(b)(1) of the Act. Section 240A(b)(1) of the Act grants relief to a nonpermanent resident who: (a) has been physically present in the United States during the preceding ten years, (b) has been a person of good moral character during those ten years, (c) has not been convicted of an offense under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3), and (d) establishes that removal would result in exceptional and extremely unusual hardship to his spouse, parent or child who are lawful permanent residents or U.S. citizens.

In order to satisfy the "exceptional and extremely unusual hardship" requirement under INA § 240A(b)(1), Petitioner offered as proof his United States citizen child who has lived his entire life within the United States and has received the preventative care necessary to support a healthy childhood.

The immigration court found that Petitioner carried his burden of proof to show that he had been physically present in the united States for a continuous period of not less than 10 years immediately proceeding the date of his application. See Oral Decision of the Immigration Judge at 6 (January 2, 2002) (App., *infra*, 3). Furthermore, the immigration court concluded that there were no convictions which would serve as "stop kind" of events cutting off the 10 year required

physical presence. Id. Petitioner also established that he has not been convicted of any disqualifying offense, and that he was a person of good moral character during such period. Id.

The immigration court then concluded that the Petitioner did not establish that his removal from the United States would result in a level of hardship to his citizen child, which would be substantial beyond that which would ordinarily be expected to result from an individual's removal from the United States. Id. at 10 (App., *infra*, 3). Petitioner then timely appealed to the Board of Immigration Appeals ("BIA"), and on August 14, 2003, the BIA, without articulation of reasoning through its streamlining procedure, affirmed the holding of the immigration judge ("IJ"). (App., *infra*, 2)

Petitioner then filed a petition for direct review with the Ninth Circuit Court of Appeals alleging the BIA's streamlining procedures violated Petitioner's right to due process under the Fifth Amendment of the Constitution of the United States. Petitioner argued the Ninth Circuit retained jurisdiction because the IJ's extraction of the pure legal standard from Matter of Monreal, 23 I&N Dec.56 (BIA 2001) in regards to adjudicating hardship and application of such standard to Petitioner's novel factual context constituted a non-discretionary, and hence, reviewable, decision. On April 17, 2004, that Court issued an order, in docket number 03-73132, dismissing the petition (App., *infra*, 1) for lack of jurisdiction and failure to raise a claim in accordance with its own precedent in Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003).

REASONS FOR GRANTING THE PETITION

I. The Differing Standards for Harmless Error Among the Circuits Cause Federal Review of the BIA's Streamlining Regulations to Be Inconsistent Leading to Unequal Treatment for Aliens Depending on Geographical Location.

The BIA's streamlining regulation, otherwise known as affirmance without opinion ("AWO"), is a three-sentence decision by a single Board Member that affirms, without any explanation, the results of the decision reached by an IJ in a case. See 8 C.F.R. § 3.1(e)(4) (September 25, 2002). An AWO decision indicates that the Board member agrees with the result reached by the IJ, but does not necessarily indicate agreement with the IJ's reasons for reaching that result. See 8 C.F.R. § 3.1(e)(4)(ii). A Board member is authorized to use the AWO procedure only if the case satisfies the requirements for such a decision which are set out in the regulations. See 8 C.F.R. § 3.1(e)(4)(i).

For the AWO procedure to be used, the regulations require the Board Member to first review the merits of the case to ensure that the result reached by the IJ was correct. The Board Member must also make sure that the case satisfies several other criteria, discussed below, before using the summary AWO procedure. If a case does not satisfy all of the required criteria, then the single Board Member has the authority to issue a brief order affirming, modifying, or remanding the case. 8 C.F.R. § 3.1(e)(5). Unlike AWO decisions, these brief orders will contain at least some explanation for the decision. In very limited circumstances, the case will be reassigned to a three-Member panel of the Board. Id.; 8 C.F.R. § 3.1(e)(6). Three-Member panels of the

Board will truly become the exception, rather than the predominant method for deciding cases.

The regulations are clear that an AWO is an affirmance of the results of the IJ's decision but not necessarily an affirmance of the IJ's reasons for his or her decision. Despite the fact that the Board Member may disagree with the IJ's reasons for the decision, the Board Member is *prohibited* by the regulation from explaining his or her own reasons. Instead, the AWO decision issued by the Board Member must contain only the following three sentences: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination." 8 CFR 3.1(e)(4).

Before affirming an IJ's decision without opinion, the Board Member must determine that the case satisfies the criteria for an AWO decision set forth in 8 C.F.R. § 3.1(e)(4)(i). Specifically, the case must satisfy both of the requirements listed in sections (a) and (b) below, and one of the two alternate requirements listed in section (c):

a. the result reached by the IJ must be correct; and
b. any errors in the decision below must be *harmless or nonmaterial* (emphasis added); and either
c. (i) the issues on appeal must be squarely controlled by existing Board or federal court precedent and cannot involve the application of precedent to a novel fact situation; or
(ii) the factual and legal issues raised on appeal must be "not so substantial that the case warrants the issuance of a written opinion in the case."

As indicated above, determining "harmless error" is essential to the BIA's use of the AWO procedure.

Unfortunately, the standard for harmless error varies somewhat in different federal circuits. See Agyeman v. INS, 296 F.3d 871 (9th Cir. 2002) (finding prejudice where IJ failed to adequately explain procedures and develop the record); Podio v. INS, 153 F.3d 506 (7th Cir. 1998) (finding IJ's refusal to allow witnesses to testify was prejudicial); Perez-Lastor v. INS, 208 F.3d 773 (9th Cir. 2000) (finding alien prejudiced by his inability to understand the translator); Colemenar v. INS, 210 F.3d 967 (9th Cir. 2000) (finding prejudice where petitioner was "so clearly denied a full and fair hearing"). Moreover, several errors - each of which alone might be harmless - can have a combined effect that is prejudicial. See, e.g., Vargas-Garcia v. INS, 287 F.3d 882, 886 (9th Cir. 2002) (combination of several errors deprived petitioner of due process).

Therefore, as the definition of "harmless error" varies across the judicial circuits, there is room for disparate treatment of aliens geographically in respect to when the BIA is to use the AWO procedures depending on the circuit the case originates. More importantly, such disparate treatment in the application of immigration laws is in direct conflict with Congress' intended mission in creation of the BIA which "is to provide fair and timely immigration adjudications and authoritative guidance and *uniformity in the interpretation of the immigration laws*." Casas-Chavez v. INS, 300 F.3d 1088, 1092 (9th Cir., 2002)(quoting 64 FR 56135-01, 56136 [1999])(emphasis added). The Second Circuit has supported this contention in holding that the *interests of uniformity in interpretation of immigration law* should outweigh the interests of a circuit's precedence. See Sutherland v. Reno, 228 F.3d 171, 174 (2d Cir., 2000)(emphasis added). This apparent conflict merits a proper review before this Court.

II. The Ninth Circuit Court of Appeals Dismissal for Lack of Jurisdiction and Failure to Raise A Colorable Challenge to the BIA's AWO Was in Error and in Conflict with its Own Precedent.

In Hernandez, the Ninth Circuit held:

> In assessing whether a particular element is discretionary or nondiscretionary, we consider a number of factors. We have noted that determinations that "require application of law to factual determinations" are nondiscretionary. Hernandez v. Ashcroft, 345 F.3d 824, citing Kalaw v. INS, 133 F.3d 1147, 1150-52 (9th Cir. 1997).

In addition, this Court has also held that a decision by an Immigration Judge for the "exceptional and extremely unusual hardship" element under INA § 240A(b)(1) *can* be nondiscretionary and therefore reviewable by the Ninth Circuit. Montero-Martinez v. Ashcroft, 277 F.3d 1137, 1141 (9th Cir. 2002) (holding that the element of the "exceptional and extremely unusual hardship" determination that involves the factual determination of whether an adult daughter is a child is nondiscretionary because it only "requires us to review the BIA's construction of the INA, which is a pure question of law. This question would not require us to review a discretionary determination by the BIA.").

What these two cases most importantly determine therefore is that if an Immigration Judge's decision regarding the "exceptional and extremely unusual hardship" element under INA § 240A(b)(1) involves a pure application of law to factual determinations, then such is a nondiscretionary decision and allows the Ninth Circuit to retain jurisdiction.

The IJ in the present case extracted a pure legal standard from BIA precedent in Matter of Monreal, 23 I&N Dec.56 (BIA 2001) in determining if Petitioner's child met the hardship standard for cancellation of removal. The language from the IJ's opinion that the "Board of Immigration Appeals in Matter of Monreal, 23 I&N Dec.56 (BIA 2001) outlines the *standard* (emphasis added) that an Immigration Judge *must follow*" (App., *infra*, 3) further evidences the existence of pure application of law to a factual determination. The BIA's use of the AWO procedure was therefore in error because, as discussed above, the case "cannot involve the application of precedent to a novel fact situation." 8 C.F.R. § 3.1(e)(4)(i).

III. The Question Presented Is Important.

A. The Various Circuits Have Consistently Held That an Alien Is Entitled to a Reasoned Decision by the BIA.

This Court has specifically held that an agency, such as the BIA, is required to explain the reasons behind a decision. SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1946) (calling the requirement a "fundamental rule of administrative law") see also Guentchev v. INS, 77 F.3d 1036, 1038 (7th Cir. 1996) (a statement of reasons for a decision is a "norm of administrative law"). In the Federal Register announcement of the current AWO regulation, the DOJ acknowledged that appellants in removal proceedings have a "right to a reasoned administrative decision." Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 FR 56135, 56137(1999).

Federal courts have routinely required the Board to provide an explanation for a decision that is sufficient to allow the court to carry out a review. See, e.g., Panrit v. INS, 19

F.3d 544, 546 (10th Cir. 1994)(quoting Turri v. INS, 997 F.2d 1306, 1310 (10th Cir. 1993) [noting that Board has an obligation to "articulate a reasoned basis for its decision"]); Mousa v. INS, 223 F.3d 423, 430 (7th Cir. 2000) (Board must consider all claims and "give careful, individualized, rational explanations for its decisions"); Guentchev v. INS, 77 F.3d at 1038 (citation omitted) (Board "must announce its decision in terms sufficient to enable a court to determine it heard and thought and not merely reacted"); Paramasamy v. Ashcroft, 295 F.3d 1047 (9th Cir. 2002) (Board must provide a 'comprehensible reason for its decisions sufficient for [the court] to conduct [its] review and to be assured that the petitioner's case received individualized attention"); Vargas v. INS, 938 F.2d 358, 363 (2nd Cir. 1991) (citations omitted) ("Board's decision stands or falls on its express findings and reasoning"); Tukhowinich v. INS, 64 F.3d 460, 464 (9th Cir. 1995) (citations omitted) (setting aside a Board decision which failed to support its conclusion with a reasoned explanation based on legitimate concerns).

The Ninth Circuit, where this case originated, has specifically held "we do not allow the Board to rely on 'boilerplate' opinions 'which set out general legal standards yet are devoid of statements that evidence an individualized review of the petitioner's circumstances.'" Ghaly v. INS, 58 F.3d 1425, 1430 (9th Cir. 1995). The Ninth Circuit continued in that the "BIA's decision must contain a statement of reasons for denying petitioner relief adequate for us to conduct our review." Id.

As discussed above, the three sentence AWO decision does not contain any reasons or explanation as to why the decision was reached. To complicate matter, such a decision fails to even reach the "boilerplate" decision the Ninth Circuit clearly frowns upon. See Ghaly v. INS, supra. The BIA's AWO

therefore procedure stands in direct conflict to the various circuits' holding that an alien, at minimum, is entitled to a cogent and decipherable decision by the BIA. This clear conflict stresses the importance for review before this court.

B. The AWO Procedure Is Fundamentally Flawed and Deprives an Alien of Adequate Review in the Agency Specifically Created by Congress for Adjudication of His or Her Immigration Case.

Many of the circuit courts which have ruled on the AWO procedure have taken great effort to comment on such procedure's fallible nature. The First Circuit Court of Appeals expressed concern that a Board member can use the AWO procedure without having to explain why a case meets the AWO requirements. See Albathani v. INS, 318 F.3d 378,379 (1st Cir., 2003). As a result, a court may not be able to tell whether the Board member fully reviewed the case and correctly applied the regulation. Albathani v. INS, 318 F.3d 378,379 (1st Cir., 2003). The Court also recognized that this was not an abstract concern in light of the huge caseload faced by the Board. Id. The Court indicated it would likely consider the issue differently if there was evidence of misapplication of the AWO procedure by the Board, particularly evidence of systemic misuse of the procedure. Id. at 377.

Recently, the Fifth Circuit Court of Appeals has echoed the general concern regarding the flaws in the AWO procedure. In Yuqing Zhu v. Ashcroft, 382 F.3d 521 (5th Cir., 2004), the Second Circuit vacated the BIA's use of AWO because court did not know if the BIA affirmed on a non-reviewable basis, i.e., untimeliness, or a reviewable basis, i.e., the merits of the asylum claim.

These concerns are clearly valid and discernable in practice when considering the amount of cases in which the AWO procedure is utilized. According to an investigation by the Los Angeles Times, 57% of the cases decided by the Board in October 2002 were affirmed without opinion. In total, individual Board members summarily affirmed 16,275 cases between March 1, 2002 and September 24, 2002. This increase in AWO decisions corresponds with an increase in denials; in October 2002, for example, the Board rejected 86% of its appeals, compared with 59% the previous October. See L. Getter and J. Peterson, Speedier Rate of Deportation Rulings Assailed, Los Angeles Times, January 5, 2003, at A-1.

In addition, the American Immigration Law Foundation has taken an informal study which indicates:

> that half of the decisions issued by the Board were AWO decision; this means that there may have been over 100 AWO decisions on any given day...under the new regulations, an even larger number of AWO decisions is likely, because the AWO process - which was discretionary - is now mandatory for all cases that satisfy the criteria because Board Members are churning out such a high volume of these decisions, it is difficult to believe that they are carefully reviewing every appeal to ensure that it meets all of the requirements for an AWO decision[2]. See Kenney,

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[2] For example, in Farjardo v.INS, 2002 U.S. Lexis 16045 (9th Cir. Aug. 9, 2002), the court reversed and remanded an AWO decision after finding that the underlying decision by the IJ was based upon two "clear"-and prejudicial - errors of law. AWO should never have been used in that case, since one of the requirements is that any errors by the IJ be harmless ones.

Mary, How To Challenge An Affirmance Without Opinion By A BIA Member, <http://www.ailf.org/lac/lac_pa_100102.asp>, September 27, 2002 at 2.

These statistics clearly illustrate the sheer number of AWO cases and further reveal the likely possibility of gross and flagrant error put forth by the circuit courts as discussed above further stressing the importance of review in the instant case.

C. Even the Government, Who Advocated Used of the AWO Procedure in the Instant Case, Has Been Forced to Realize the Procedure's Invalid Nature.

The government has moved to remand some federal court appeals for new Board decisions specifically because the Board erred in using the AWO procedure in the case. See, e.g., Paz v. Bulger, No. 02-22024 (S.D. Fla. Dec. 5, 2002) (because the Board had erroneously used the AWO procedure, government requested remand so that a three-member panel of the Board could decide the appeal); Tapia-Rodriguez v. Ashcroft, No. 02-60660, motion to dismiss filed, (5th Cir. Feb. 5, 2003) (government moved to dismiss court appeal

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Similarly, in the precedent case Matter of Ramos, 23 I. & N. Dec. 336 (BIA 2002), a single Board Member originally - and erroneously - used the AWO procedure to affirm the IJ's determination that a felony DWI under Massachusetts's law was an aggravated felony. On reconsideration, the Board, en banc, used this case to overrule its earlier precedent on DWI convictions. A precedent-setting case by definition cannot satisfy the criteria for AWO and the single Member clearly erred in using this procedure initially. Unfortunately, most erroneous AWO decisions will not be overturned on reconsideration.

after Board sua sponte reopened case – upon government's request – because it had erred in using the AWO procedure); Sylla v. INS, No. 02-2915/03-1348 (3d Cir. Feb. 10, 2002) (government moved to remand case to the Board after petitioner and AILF challenged the AWO procedure).

Therefore, the Government has repeatedly questioned the validity of the very same procedure it advocates for in the instant case. At minimum, such conflict demonstrates the critical nature importance of this issue thus deserving of this Court's review.

D. Invalidation of the AWO Procedure and Requirement of the Bia to Put Forth a Reasoned Opinion Would Alleviate the Heavy Case Load in the Judicial Circuits.

It is common knowledge for any practitioner in the federal court system that the federal courts are severely overworked. In the present case, Respondent argued as support for its motion to file pleading instanter:

> The Office of Immigration Litigation, which is the organizational unit within the U.S. Department of Justice in which the undersigned counsel is situated, has been inundated with cases as a result of the unprecedented number of cases *being disposed of by the Board of Immigration Appeals* and the subsequent filings of petitions for review in the courts of appeals. During the past fiscal year, this Office has received a total of *7,569 new cases. Of which 4443 were either personally or jointly handled cases*. (App., *infra*, 4) (emphasis added).

Forcing the BIA to put forth reasoned opinions would clearly lessen the already-heavy burden on the federal courts and increase judicial economy. Moreover, this sheer number of new filings demonstrates the burden the AWO procedures are placing on the federal courts in abdication of the BIA's statutory duties and in deprivation of an alien's Fifth Amendment right to due process.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 12, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-73132
Agency No. A78-541-800

[Filed August 17, 2004]

JAVIER ZAMACONA-ESCALERA, Petitioner,	)
v.	)
JOHN ASHCROFT, Attorney General, Respondent.	)

ORDER

Before: SCHROEDER, Chief Judge, RAWLINSON and CALLAHAN, Circuit Judges

We have reviewed petitioner's response to the court's order to show cause, and we find it to be unpersuasive. Furthermore, we conclude that petitioner has failed to raise a colorable due process claim to invoke our jurisdiction over this petition for review. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003), *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001). Accordingly, this petition for

review is dismissed for lack of jurisdiction. *See* 8 U.S.C. § 1252(a)(2)(B)(I); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 892 (9th Cir. 2003); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002).

DISMISSED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78-541-800 - SAN DIEGO

Date: AUGUST 14, 2003

In re: ZAMACONA-ESCALERA, JAVIER ***PF5

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Hilts, Murray D., Esquire

ON BEHALF OF DHS: Julia Cline, ADC

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is

permitted to voluntarily depart from the United States, without expense tot he Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26©), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty or not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/_____
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Diego, California

File No.: A 78 541 800 Date: January 2, 2002

In the Matter of

JAVIER ZAMACONA-ESCALERA)
)
Respondent)
)

IN REMOVAL PROCEEDINGS

CHARGE : Section 212(a)(6)(A) (in) of the I&N Act (present in the United States without being admitted or paroled after inspection).

APPLICATIONS: Cancellation of removal for non-permanent resident; voluntary departure at the conclusion of the proceedings.

ON BEHALF OF RESPONDENT:

Thomas A. Lappin, Esquire
1094 Cudahy Place, Suite 108
San Diego, California 92110

ON BEHALF OF SERVICE:

Julia A. Cline, Esquire
880 Front Street, Suite 1234
San Diego, California 92101

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent, a 36 (almost 37) year old native and citizen of the country of Mexico, first entered into the United States some time in Augush 1987 without first being admitted or paroled after inspection by an Immigration Officer. The Immigration and Naturalization Service also believed that the respondent had entered some time in 1999 without being admitted or paroled after inspection. As a result, on July 28, 2000, the Immigration and Naturalization Service served on the respondent a Notice to Appear (Form I-862) (Exhibit IA). The charging document was filed with the court in San Diego, California on August 28, 2000, vesting this Court with jurisdiction over the respondent's case.

As the record will reflect, the respondent was not present in court for his initial hearing on October 3, 2000. On that date, the respondent's case was consolidated with other matters or individuals who were scheduled for a hearing, but did not appear. In addressing this case individually, the Court asked the Immigration Service whether it had the proper address for the respondent. A review of the record indicated the respondent actually had provided apartment 5 and not apartment R as his proper address. The Court then on its own motion rescheduled the case for further hearing to afford the respondent proper notice. Notice of the hearing was sent to the respondent informing him of his hearing on December 7, 2000. The Court was required to conduct a detailed and consequently rescheduled the case. At the rescheduled hearing

on January 25, 2001, the respondent was present in court and appeared with counsel of his own choosing. The respondent admitted to the truth of all factual allegations except as to the date of entry in 1999. He asserted an initial date of entry in 1987. He does concede that he is removable as charged. Based upon the respondent's admission and concession through counsel, the Court does find it has found the respondent to be removable from the United States for purposes of finding him present without being admitted or paroled after inspection, it is not significant whether that date is 1987 or 1999. There Is no dispute regarding the respondent's removability from the United States. The Court finds him to be removable as charged.

He named Mexico as the country of choice for removal purposes. He indicated dhat he desire to seek cancellation of removal for certain non-permanent resident and post-conclusion voluntary departure in the alternative. The Court set the case over for a further hearing and afford the parties an opportunity to prepare in the case.

On March 12, 2d,01, the respondent filed with the Court his Application for Cancellation of Removal and Adjustment of Status for Certain Non-Permanent Resident (Form EOIR-42B) (Exhibit 12). He also filed additional documents on March 26, 2001 (Group Exhibit 13) o support his application. He filed a Motion for Extension of the filing deadline and to continue the merits hearing. He represented that there was a criminal matter that could potentially impact regarding any relief granted the respondent's motion and continue the case to the master calendar to see what the results of any criminal matter might be, and the possible impact it would ihave on the respondent's eligibility for any relief that he sought.

At the hearing lon July 26, 2001, the respondent was

present in Court appearing with counsel of record. He represented that the conviction the respondent suffered was for a simple battery in violation of California law. The case was set over for a hearing on today's date, and the parties were given an opportunity to address any outstanding issues and to support additional evidence.

The respondent on November 16, 2001, filed additional documentation (Group Exhibit 18) which he gave documents pertaining to the two convictions that he suffered, a statement from an acquaintance of the respondent who has been his friend since 1990, and a letter from a business representative of the union to which the respondent belongs, along with a photocopy of a Department of Motor vehicle identification card. The copy of the identification card shows the respondent having been issued that card on November 4, 1987.

On today's date, the respondent reiterated to the Court that he's not interested in pre-conclusion voluntary departure under Section 240B(a) of the Act, but will proceed with his application for cancellation of removal for certain non-permanent resident in accordance with Section 240A(b) (1) of the Act, and post-conclusion voluntary departure under Section 240B(b) of the Act in the alternative. He relies not only on the application and the other documentary evidence of record in an effort to meet his burden of proof, but also relies on his testimony delivered under oath and the testimony of an acquaintance, Nathaniel Thomas, which was accepted by way of stipulation, who argues that he has carried his burden of proof for all forms of relief. The Service counters that has not carried his burden of proof for cancellation of removal or certain non-permanent resident because he has not met the requisite level of hardship to his United States Citizen son. The Service contends for post-conclusion voluntary departure. There are serious discretionary matters which the Court must

address. The Court will examine cancellation of removal for certain non-permanent residents before addressing post-cenclusion voluntary departure in the alternative.

Under Section 240A(b) (1) of the Act, the Attorney General may cancel the removal of and adjust the status of an individual to a lawful permanent resident for someone who establishes that he has been physically present in the United States for a continuous period of not less than 10 years immediately proceeding the date of such application, that he has been a good person of good moral character during such time period, that he has not been convicted of a disqualifying offense, and that he establishes that his removal would result in exceptional and extremely unusual hardship to the respondent's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent resident. Lastly, the respondent would have to establish that he deserves the relief as a favorable exercise of discretion.

The Court finds that the respondent has met his burden of proof to show that he has been physically present in the United States for a continuous period of not less than 10 years immediately proceeding the date of his application or the date that the Notice to Appear was served upon him. Furthermore, the Court concludes that there are no convictions which would serve as stop kind of events cutting off the 10 year required physical presence. The respondent has testified credibly that he has been present in the United Stites since August of 1987. His testimony is corroborated by the testimony of Nathaniel Thomas, and it is corroborated by documents that the respondent has offered. The documents show that the respondent obtained a California ID card in 1987. He has departed the United States once in 1999. He testified candidly that he was encountered by border patrol agents and offered voluntary return. Such voluntary return,

while it would have been an obstacle for physical presence versus deportation, no longer is an obstacle or interrupted any physical presence for cancellation of removal for certain non-permanent residents. The evidence presented then establishes that an initial period of presence beginning in August of 1987 and ending only on July 28, 2000, when the Notice to Appear was served on the respondent, he has established the 10 years physical presence.

In addition, the respondent has established that he has not been convicted of a disqualifying offense, and that he has been a person of good moral character during such period. The respondent has shown himself to be a problem for state officials by being arrested and convicted of a violation of California Penal Code Section 591, and for a violation of California Penal Code Section 242-243(a). As ably argued by his counsel, neither offense is one which would be a crime involving moral turpitude. Considering those two convictions with the total period of time that the respondent has been in the United States, noting that in the end it appears that the respondent is generally motivated by a desire to work hard and provide a better life for himself and his family. The Court does conclude that he has established that he is a person of good moral character for the requisite period of time, and that he has not been disqualified through any criminal conviction.

The central issue in the case is whether the respondent has met his burden of proof to show that his removal would result in exceptional and extremely unusual hardship to his young citizen child, Javier, who will soon be two years of age. The Board of Immigration Appeals in Matter of Montreal, 23 I&N Dec. 56 (BIA 2001) outline the standard that an Immigration Judge must follow in terms of attempting to ascertain what would be considered exceptional and extremely unusual hardship. A majority of the Board of Immigration Appeals

concluded that the respondent would have to demonstrate that his child would suffer hardship that is substantial beyond that which would ordinarily be expected to result from an individual's removal, but need not show that such hardship would be "unconscionable". Indeed, any hardship to a united States Citizen child is a significant factor which must receive close attention in evaluating a removal case. See Casem v. INS, 8 F.3d 700 (9th Cir. 1993) (examination of hardship to a child in the suspension of context). The Board of Immigration Appeals has enumerated the factors which an Immigration Judge must consider in determining whether he has established the requisite level of hardship to his qualifying family members. See Matter of Montreal, Supra at 63-64. Without repeating those factors here, the Court concludes that the respondent has not established that his removal from the United States would result in a level of hardship to his citizen child, which would be substantially beyond that which would ordinarily be expected to result from an individual's removal from the United States.

In reaching this conclusion, the Court is mindful that the respondent himself has been in the United Stats for more than 14 years. He arrived to this country at approximately age 22. He completed a high school education in his native country of Mexico. After finishing high school, he began working immediately as a waiter. He earned a low-level of income, but was able to survive on the tips that he received from working at the restaurant. He and his wife came to this country in August of 1987 to look for a better life for themselves. His spouse returned to Mexico in 1993 to give birth to their daughter Cynthia. She returned shortly thereafter and came back to the United States. The respondent explained that they did not really know any better, and since the respondent was struggling here in the United States at that time, his spouse decided to go back to Mexico to give birth, but quickly

returned to the United States with the child.

The respondent himself has progressed in the United States. He is now earning more than $18.00 per hour here in the United States. He is employed full time. He is a member of his union. As a result of his employment and his union membership, he receives medical benefit for himself and his family members including his son, Javier. He is earning money towards retirement. He also earns vacation time.

If the respondent is removed from the United States, he is undecided as to where he would go in Mexico. The evidence before this Court is clear that he would take his son, Javier, with him to Mexico. The respondent on this record would appear to have choices as to where he might be able to go. The respondent could perhaps go to Acapulco where his mother resides. The respondent perhaps cduld go to another major metropolitan area. The respondent believes that his son, Javier, would son because the respondent would lose his employment in the United states. He would not be able to find comparable employment at he wage he earns now. This Would impact Javier economically. Also he believes that he would lose insurance that currently covers Javier, although Javier is in good health. The insurance stands ready to provide any preventive care that Javier might need. The respondent asserts that if he leaves the United States, he'll lose the insurance and lose the opportunity to provide any future medical care for Javier should that become necessary.

As a two year old, Javier appears to be in good health, based upon the evidence which has been presented to this Court. There is no evidence regarding any language or languages that Javier was beginning to learn. While Javier would suffer economically and would lose the insurance coverage that his father has for him if the respondent goes to

Mexico, these hardships would be swaged by the fact that the respondent is a hard working individual with a solid education in his native country of Mexico. This will benefit Javier because the respondent would likely be able to find employment, while it would be perhaps at a lesser wage than what the respondent is learning. Javier would be in Mexico with other important family members including all of his grandparents, while be it the grandparents on his paternal side live apart and Javier's grandparents on the maternal side, his grandfather had difficulties with the respondent which has led to the respondent's first conviction in the United States. But given Javier's tender age and his father's ties to Mexico, and in the absence of any particular health problems or other needs, the respondent simply has not shown that Javier would suffer hardship that is substantially beyond that which would ordinarily be expected to result from an individual's removal. Given Javier's tender age and apparent good health, the hardships appear to be economic in nature. The respondent has not carried his burden of proof to show that his removal would result in the requisite of hardship to his citizen son Javier. His application is denied, as there are no other qualifying members. See Section 240A(b) (I) (D) of the Act.

The Court concludes that the respondent has not met his burden of proof to establish his eligibility for cancellation of removal for certain non-permanent residents. Therefore, the Court will not dwell significantly on the question of discretion had he established his statutory eligibility except to note the following. Had the case come down to a question of discretion, the Court would have exercised its discretion favorably. The respondent appears to be a very honest, forthright individual. He testified candidly regarding certain incidents in a manner which could be considered detrimental to his own interest, but he did so in a forthright fashion. He has had problems with law enforcement officials in this

country within the State of California, but at the same time, he seems to have learned from these incidents. Had his case come down to a case of discretion had he met the burden of proof to show his eligibility, the Court would have granted him the relief as a favorable exercise of discretion; however, since he has not carried his burden of proof, the Court will not address the question of discretion further. His application for cancellation of removal for certain non-permanent residents is denied.

The respondent seeks the privilege of post-conclusion voluntary departure in the alternative under Section 240B(b) of the Act. He has established his statutory eligibility for this form of relief. He would be ready, willing, and able to depart the United States if given the opportunity. It is an important benefit for the respondent because if the law does not change, he would be able to immigrate to this country one day legally through his son. The Service has pointed out that while the respondent's convictions could be considered "minor" they have placed the respondent as a burden upon the State of California because the classes which he has been required to attend are not free and are required to be maintained at the expense of tax payers. These are negative factors which the Court considers against the respondent. .He has entered this country illegally on two occasions. Those are also negative factors. However, on his behalf, he has been a hard-working individual overall. He is motivated by a desire to provide a better life for himself, for his son, and for his family. He has achieved a lot for himself in terms of employment siince coming to this country, and that is admirable. The Court finds that, on balance, he deserves voluntary departure as a favorable exercise of discretion. Therefore, the Court will grant him this form of relief and allow him the maximum amount of time with the minimum required bond. Accordingly, the Court will enter the fallowing Orders in the

case.

ORDERS

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal for certain non-permanent resident be and is hereby denied.

IT IS FURTHER ORDERED that the respondent be allowed to depart the United States voluntarily on or before March 4, 2002, or any extension that he has received in advanced from the District Director under such conditions that the District Director shall dictate. The grant of voluntary departure is contingent upon the respondent posting a voluntary departure bond in the amount of $500 within five business days of the Court's decision. If the respondent should fail to post the required bond or if he should fail to depart the United States within the required period of time, the following Order would be entered against the respondent without any further notice or hearing to him: the respondent is ordered removed from the United States to Mexico based upon the charge contained in the Notice to Appear.

THE RESPONDENT IS FURTHER ADVISED that in accordance with Section 240B(b) of the Act that if he should fail to depart the United States within the time period specified, he shall be subject to a civil penalty of not less than $1,000 and not more than $5,000 and shall be ineligible for a period of 10 years for any further relief in the form of voluntary departure, cancellation of removal under Section 240A, adjustment of status under Section 245, any change in any non-immigrant status in accordance with Section 248, and any registry in accordance with Section 249 of the Act.

RICO J. BARTOLOMEI
United states Immigration Judge

January 2, 2002

CERTIFICATE PAGE

I hereby certify that the attached proceeding before RICO J. BARTOLOMEI, in the matter of:

JAVIER ZAMACONA- ESCALERA

A 78 541 800

San Diego, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/_____
(Jacqueline Taylor,
Transcriber)

Deposition Services, Inc. 6245
Executive Boulevard Rockville,
Maryland 20852
(301) 881-3344

April 19, 2002
(Completion Date)

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 3, 2004]

No. 03-73132

JAVIER ZAMACONA-ESCALERA)
(A78 501 825))
Petitioner,)
)
v.)
)
JOHN ASHCROFT,)
Attorney General)
Respondent.)
)

RESPONDENT'S MOTION TO FILE PLEADING INSTANTER

Respondent, by and through undersigned counsel, hereby moves the Court to accept filing of the "Respondent's Opposition to Petitioner's Stay Motion." The reasons for respondent's motion to file the subject pleaaing instanter are set forth in theattached declaration.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
Civil Division

RICHARD M. EVANS
Assistant Director
Office of Immigration Litigation
Civil Division
United States Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-9115
ATTORNEYS FOR RESPONDENT

Dated: February 3, 2004

DECLARATION

I, MARION E. GUYTON declare that:

I. I am an attorney in the Office of Immigration Litigation, Civil Division, Department of Justice, Washington, D.C., and in that capacity and in this matter represent the respondent in this case.

2. On September 2, 2003, petitioner filed a petition for review, accompanied by a motion to stay his removal. Thereupon, on September 2, 2003, in accordance with the provisions of Ninth Circuit General Order 6.4 (c) (7), this Court entered a scheduling order for the certified administrative record and response to petitioner's stay motion to be filed by December 1, 2003. On December 2, 2003, the undersigned counsel for respondent filed an oral request for a 60-day extension of time in which to file the certified administrative record and respond to petitioner's request for

stay, in accordance with the provisions of Ninth Circuit General Order 6.4(c) (8). Subsequently, on December 2, 2003, in accordance with the provisions of Ninth Circuit General order 6.4(c) (8), this Court granted respondent's oral request for a 60-day extension of time in which to file the certified administrative record and to respond to petitioner's stay motion. The administrative record and the Government's response became due for filing on or before January 30, 2003.[1]

3. Respondent now moves the Court to accept filing of the "Respondent's Opposition to Petitioner's Stay Motion."

4. Respondent's counsel have exercised due diligence in addressing this matter. The Office of Immigration Litigation, which is the organizational unit within the U.S. Department of Justice in which the undersigned counsel is situated, has been inundated with cases as a result of the unprecedented number of cases being disposed of by the Board of Immigration Appeals and the subsequent filings of petitions for review in the courts of appeals. During this past fiscal year, this Office received a total of 7,569 new cases, of which 4443 were either personally or jointly handled cases. On average, the Office is assigning approximately 100 briefs a week to attorneys within the office for handling. As an example, during September 2003, 439 responsive briefs were assigned to attorneys within the office for handling. Accordingly, good cause exists for respondent's requested motion to file the subject pleading instanter.

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[1] The certified administrative record was filed on October 21, 2003.

I declare under penalty of perjury that the foregoing is true and correct. Executied this 3rd day of February, 2004.

/s/_____
Marion E. Guyton
Trial Attorney
Office of Immigration Litigation Civil Division
United States Department of Justice
P.O. Box 878, Ben Franklin station
Washington, D.C. 20044
Telephone: (202) 616-9115

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this __ day of February, 2004, a copy of the attached instanter motion was served on petitioner's counsel via first class mail, by placing it, postage prepaid, in a United States Department of Justice mail room for same day mailing, addressed to:

Murry Hilts, Esq.
3020 Meade Ave.
San Diego, CA 92116

/s/_____
Marion E. Guyton
Trial Attorney
Office of Immigration Litigation
Civil Division
United States Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

CERTIFICATE OF SERVICE (omitted)